

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 15, 1997

UNITED STATES OF AMERICA,)	
Complainant)	
)	8 U.S.C. 1324a Proceeding
vs.)	
)	OCAHO Case No. 97A00124
YOSHIE MAKINO,)	
D/B/A LIGHT HOUSE BUFFET,)	
Respondent)	

ORDER GRANTING COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES

On July 21, 1994 complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served a Notice of Intent to Fine (NIF), 94-EO-000-251, upon Yoshie Makino d/b/a Light House Buffet (respondent). That single-count citation alleged 40 paperwork violations of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a)(1)(B), for which civil money penalties totaling \$12,000 were proposed.

Respondent was advised in the NIF of her right to file a written request for a hearing before an Administrative Law Judge assigned to this Office provided that she filed such request within 30 days of her receipt of the NIF.

On August 11, 1994, respondent timely filed such a request.

On June 13, 1997, complainant filed the single-count Complaint at issue, reasserting the 40 violations set forth in the NIF, as well as the previously-assessed civil money penalties totaling \$12,000.

On June 17, 1997, a Notice of Hearing on Complaint Regarding Unlawful Employment, as well as a copy of the Complaint at issue, were served on respondent by certified mail, return receipt requested.

On July 16, 1997, a timely answer was filed on respondent's behalf, in which she denied having violated IRCA in the manners alleged, and also asserted four (4) affirmative defenses.

On August 1, 1997, complainant filed a pleading captioned Motion to Strike Respondent's Affirmative Defenses, in which it requested that respondent's four (4) affirmative defenses be stricken because all are either factually or legally insufficient as a matter of law and fact.

On August 22, 1997, respondent filed a pleading captioned Response to Motion to Strike Affirmative Defenses.

Because OCAHO procedural rules do not provide for motions to strike, it has been the practice of this Office to utilize Rule 12(f) of the Federal Rules of Civil Procedure as a guideline in considering such motions. 28 C.F.R. § 68.1; United States v. Chi Ling, Inc., 5 OCAHO 723, at 12 (1995)¹; United States v. Makilan, 4 OCAHO 610, at 205 (1994). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense."

Motions to strike affirmative defenses are not favored in the law and are only granted when the asserted defense lacks any legal or factual grounds. Chi Ling, Inc., *supra*; United States v. Task Force Security, Inc., 3 OCAHO 533, at 1344 (1993) (Order Granting In Part and Denying In Part Motion to Strike Affirmative Defenses and Denying Motion for Judgment on the Pleadings).

Thus, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts has not been provided or is wholly conclusive in nature.

Utilizing those parameters, we examine respondent's initial affirmative defense:

Respondent alleges that Respondent's inability to read English should be taken in (sic) consideration as mitigating factor in that Respondent could not read the contents of Form I-9, and had asked her accountant how to fill out the Form I-9, and in fact filled out the forms exactly as explained by the accountant, but had not signed the form as she was not told to do so (sic).

Respondent's inability to read English, as well as the reliance she has placed upon her accountant for properly completing the Form I-9, are not valid defenses to paperwork violations.

As complainant accurately notes, respondent has not cited any statutory, regulatory or

¹ Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, reflect consecutive pagination within each bound volume; pinpoint citations to Volumes 1 through 5 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

decisional authorities in support of this claimed affirmative defense. Accordingly, respondent's first affirmative defense is hereby ordered to be and is stricken.

For its second affirmative defense, respondent states:

Respondent alleges that she made a good faith and substantial compliance of the regulations in filling out the Form I-9, filling out all necessary information as required, except her own signature which she did not know she had to do, due to her poor understanding of the English language.

Good faith is an assertable affirmative defense in knowing hire violations, 8 U.S.C. § 1324a(a)(1)(A), but not in allegations which, as here, involve only paperwork violations. It is only proper for the Administrative Law Judge to consider respondent's good faith as a mitigating factor in determining the appropriate civil money penalties for any proven paperwork violations. See 8 U.S.C. § 1324a(e)(5).

OCAHO case law recognizes a viable substantial compliance defense to alleged paperwork violations of section 1324a(a)(1)(B) in certain limited circumstances. United States v. Mesabi Bituminous, Inc., 5 OCAHO 801, at 644 (1995); United States v. Northern Michigan Fruit Co., 4 OCAHO 667, at 694 (1994) (noting that "all other OCAHO decisions addressing the issue have agreed that substantial compliance may be an affirmative defense to allegations of paperwork violations."); see also United States v. Corporate Loss Prevention Assocs., 6 OCAHO 886, at 2 (1996) (Prehearing Conference Report) (adopting Northern Michigan criteria).

In Northern Michigan, the Administrative Law Judge held that an employer may have substantially complied with the paperwork verification requirements if five (5) criteria have been met, including the employer's signature in section 2 under penalty of perjury. 4 OCAHO 667, at 697. Respondent has admitted that she failed to sign section 2 of the pertinent Forms I-9 at issue, and thus has failed to meet at least one of the requirements for finding substantial compliance.

Accordingly, respondent's second affirmative defense is also being hereby ordered to be stricken.

For its third affirmative defense, respondent states:

Respondent alleges that Immigration and Naturalization Service is equitably estopped to allege Respondent's violation in that when Respondent took all the I-9 forms to INS for inspection, INS officer asked her to leave them for copying, and after copying, INS officer brought them back to Respondent's restaurant, without telling her to sign verification, or informing her that her signatures were missing on Form I-9, giving her false impression and belief that I-9 forms had been properly completed until she was later accused of the violation as complained.

To the extent that this claimed affirmative defense asserts an estoppel argument, OCAHO case law has placed significant reliance on the U.S. Supreme Court's decision in Heckler v.

Community Health Services of Crawford County, 467 U.S. 51 (1984) in consistently holding that the INS may not be estopped on the same terms as other litigants. United States v. Manos & Assocs., Inc., 1 OCAHO 130, at 885 (1989) (Order Granting in Part Complainant's Motion for Summary Decision); United States v. De-Leon Valenzuela, 6 OCAHO 899, at 4 (1997) (facts must show that government agent has committed affirmative misconduct which goes beyond mere negligence); see also Rider v. United States Postal Service, 862 F.2d 239, 241 (9th Cir. 1988), cert. denied, 490 U.S. 1090 (1989); Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

Neither silence on the part of the INS' agents before, during or after a compliance inspection nor its failure to inform an employer of any detected compliance failures are sufficient grounds for estopping the INS from subsequently pursuing charges against an employer for paperwork violations. Respondent has failed to furnish any other facts which create the required affirmative misconduct which is necessary to estop the government.

Accordingly, respondent's third affirmative defense is hereby being stricken, also.

For its fourth affirmative defense, respondent states:

Respondent alleges that the penalty prayed by the INS results in harsh and unreasonable application of the regulations in the instant case in that Respondent's so-called violation was neither intentional nor negligent, and it was caused solely by language problem.

There is no requirement that the complainant demonstrate that the respondent intentionally or negligently committed the violations at issue. An employer's failure to properly complete the Form I-9 is in the nature of a strict liability offense and is thus a per se violation of IRCA's paperwork requirements in all but the most limited and inapplicable circumstances. As noted earlier, a linguistic shortcoming is not an acknowledged defense to paperwork violations in OCAHO jurisprudence.

Accordingly, respondent's fourth affirmative defense is also being hereby ordered to be stricken.

In view of the foregoing, complainant's Motion to Strike Respondent's Affirmative Defenses is granted and the four (4) affirmative defenses asserted by respondent in her July 16, 1997, answer are hereby ordered to be and are stricken.

It is noted that respondent failed to affix the required signature in section 2 of the 40 Forms I-9 at issue, as complainant alleges. In view of that oversight, complainant is hereby requested to furnish copies of each of those 40 documents. In that manner, the alleged facts of violations in these alleged paperwork violations can be addressed in a dispositive motion, as opposed to a hearing, leaving at issue only the appropriate civil money penalties to be assessed for those infractions.

Under the pertinent IRCA provision, 8 U.S.C. § 1324a(e)(5), the civil money penalty sum which must be assessed for each proven paperwork violation ranges from the statutorily mandated minimum penalty amount of \$100 to the maximum sum of \$1,000, by giving due consideration to and utilizing the five (5) listed criteria for that purpose.

Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1997, I have served copies of the foregoing Order Granting Complainant's Motion to Strike Affirmative Defenses to the following persons at the addresses shown, in the manner indicated:

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